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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 434

DEPARTMENT OF FORESTS AND PARKS, ET AL.,
Petitioners,

v.

GEORGE'S CREEK COAL AND LAND COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

WILLIAM C. WALSH,
WILLIAM WALSH,
ROBERT H. REINHART,
504 Liberty Trust Bldg.,
Cumberland, Md. 21502,
Attorneys for Respondent.

The Daily Record Co., Baltimore, Md. 21203

INDEX

Table of Contents

	PAGE
Statement of the Case	1
Argument:	
I. There is no federal question involved in the case	1
II. The federal question which Petitioners seek to raise is untimely	3
III. There is no conflict between the various state courts in the construction of deeds containing mineral grants or reservations	3
IV. The State of Maryland is not a "person" within the intendment of the 14th Amendment to the United States Constitution	4
V. The State of Maryland is not a "person" within the meaning of the 14th Amendment to the United States Constitution	5
Conclusion	5

Table of Citations

Cases

Black v. Cutter Laboratories, 100 L. Ed. 1188	2
Commonwealth v. Fisher, 72 A. 2d 568	2
Commonwealth v. Fitzmartin, 102 A. 2d 893	2
Franklin v. Callicoat, 119 N.E. 2d 688	2
Helvering v. Fuller, 84 L. Ed. 1082	3
Kryger v. Wilson, 61 L. Ed. 229	2
Rochez Bros. v. Duricka, 97 A. 2d 825	4
South Carolina v. Katzenbach, 15 L. Ed. 2d 769	5
Southwestern Bell Telephone Co. v. Oklahoma, 82 L. Ed. 751	3
United States v. Polino, 131 F. Supp. 772	2
West Virginia-Pittsburgh Coal Co. v. Strong, 42 S.E. 2d 46	4

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STATEMENT OF THE CASE

Respondent accepts Petitioners' Statement of the Case.

ARGUMENT

I.

There Is No Federal Question Involved in the Case.

This case was tried in the Circuit Court for Garrett County, Maryland, in Equity, on a Bill of Complaint for Declaratory Decree filed by the Respondent, George's Creek Coal and Land Company, for the purpose of securing judicial construction of a mineral reservation contained in a deed by which Respondent's corporate predecessor, a Maryland corporation, conveyed the surface of certain land to

one of the Petitioner's predecessors in title, a resident of the State of Maryland, specifically reserving the coal and other minerals and the right to remove them. In a subsequent conveyance of the surface estate to the State of Maryland, the United States inserted a provision in the deed providing for reverter of the land if it was used for other than public purposes.

Respondent contends that this reverter provision, injected by the United States and accepted by the State of Maryland at a time long after Respondent's mineral rights were established and to which Respondent was not a party, cannot affect those rights. The decision of the trial Court, affirmed by the Court of Appeals of Maryland was based upon the interpretation of the deed and reservation, aided by relevant extrinsic evidence bearing on the intention of the parties to the 1931 deed and the circumstances surrounding its execution. The case involved the construction of a deed and was purely a question of local common law, in the determination of which no federal question was involved. *Kryger v. Wilson*, 37 S. Ct. 34, 242 U.S. 171, 61 L. Ed. 229; *Black v. Cutter Laboratories*, 76 S. Ct. 824, 351 U.S. 292, 100 L. Ed. 1188.

Respondent found no case in any state which has considered the issue here involved where a federal question was raised or any attempt was made to seek review by Writ of Certiorari claiming the existence of a federal question. *Commonwealth v. Fisher*, 72 A. 2d 568 (Pa.); *Commonwealth v. Fitzmartin*, 102 A. 2d 893 (Pa.); *Franklin v. Callicoat*, 119 N.E. 2d 688 (Ohio); *U. S. v. Polino*, 131 F. Supp. 772 (N.D., W. Va.). The claim that the decision of the Maryland Courts deprives the State of its property without due process of law is untenable. Respondent is merely given the right to remove its minerals and to utilize por-

tions of the surface for that purpose. The record discloses that only about 650 acres of the 5,780 acres subject to the reservation in question would be involved in Respondent's mining operations, all of which would be subject to the State's backfilling and reclamation statutes.

II.

The Federal Question Which Petitioners Seek To Raise Is Untimely.

Assuming, *arguendo,* that a substantial federal question is present in this case, the Petitioners did not raise the matter in the Circuit Court for Garrett County, Maryland, nor in the Court of Appeals of Maryland, but seek to raise it for the first time in this Court. Federal questions raised for the first time in the Supreme Court of the United States are not normally entertained. *Helvering v. Fuller,* 84 L. Ed. 1082. It is essential to the jurisdiction of the Supreme Court in reviewing a decision of a court of a state that it appear affirmatively from the record not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the federal question was necessary to a determination of the case, that the federal question was actually decided, or that the judgment as rendered could not have been given without deciding it. *Southwestern Bell Telephone Co. v. Oklahoma,* 303 U.S. 205, 82 L. Ed. 751.

III.

There Is No Conflict Between the Various State Courts in the Construction of Deeds Containing Mineral Grants or Reservations.

The question of whether or not a grant or reservation of minerals and mining rights contained in a deed included the right to employ strip mining as a method of removing

coal has been before a number of state courts, particularly Pennsylvania, West Virginia, Ohio and Kentucky. In construing the instrument by which the mineral rights were created, all of these jurisdictions applied the same test, that is, the intention of the parties to the instrument as determined by reference to the instrument itself, and to the circumstances surrounding the making of the instrument, if necessary. Accordingly, the Supreme Court of West Virginia found that there was no right to strip mine in *West Virginia-Pittsburgh Coal Company v. Strong*, 42 S.E. 2d 46 (W. Va., 1947) because the instrument in question and the circumstances surrounding its making demonstrated that the parties did not intend to include strip mining. The circumstances attending in *Commonwealth v. Fisher, supra* and in *Commonwealth v. Fitzmartin, supra*, prompted the Pennsylvania Supreme Court to conclude that the parties intended to permit strip mining, whereas, in *Rochez Bros. v. Duricka*, 97 A. 2d 825 (Pa.), the same court came to a contrary conclusion based upon what the evidence showed the intention of the parties to be.

The decisions of the several state courts vary depending upon what the facts show the intention of the parties to be in each case, but they are not in conflict in the application of established common law rules regarding the construction of contracts.

IV.

The Surface of Land On Which Strip Mining Is Conducted Is Not Often, In Effect, Destroyed.

The State of Maryland has enacted stringent regulations of strip mining activities, including backfilling requirements, which if properly accomplished by the mining company and effectively supervised by the State, permits reclamation of the land after mining operations are complete.

V.

The State of Maryland Is Not A "Person" Within the Meaning of the 14th Amendment to the United States Constitution.

The primary purpose of the Constitutional guaranty of due process is to secure the individual citizen from the arbitrary exercise of the powers of government, and as used in the 14th Amendment, "person" is not intended to include the State of Maryland or its agencies. *South Carolina v. Katzenbach*, 383 U.S. 301, 15 L. Ed. 2d 769, 86 S. Ct. 803.

CONCLUSION

This case was tried in the State Courts of Maryland to determine the meaning and scope of a deed to Maryland land between residents of Maryland. The litigation involved the applications of settled common law rules of construction of contracts and did not involve a federal question. No federal question was suggested or raised either in the Circuit Court or the Court of Appeals, nor was a decision of a federal question necessary to a decision in the case. The application for a Writ of Certiorari should be denied.

Respectfully submitted,

WILLIAM C. WALSH,
WILLIAM WALSH,
ROBERT H. REINHART,
Attorneys for Respondent.